PERWIRA AFFIN BANK BHD

v.

SELANGOR PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: MT1-24-772-1996]
5 DECEMBER 2002

LAND LAW: *Lien - Creation - Lien holder's caveat - Whether valid since title not deposited by registered proprietor - Whether there was consent by registered proprietor to second and third defendants to deposit title - National Land Code, s. 218*

LAND LAW: *Ownership - Beneficial ownership in dispute - Transfer - Claim by plaintiff that second and third defendants beneficial owners - Whether there was transfer of ownership from registered proprietor to second and third defendants - Whether plaintiff's claim baseless*

This was an application by the plaintiff for a declaration that the second and third defendants were the owners of a piece of land ('the said land') which was currently registered in the name of the first defendant, and for an order that the said land be sold by public auction pursuant to ss. 281 and 257 of the National Land Code ('NLC') for the purpose of satisfying the judgment debt of the second defendant to the plaintiff. The plaintiff had granted a credit facility of RM130,000 to the second defendant, and it was alleged by the plaintiff that as security for the credit facility, a lien holder's caveat was created over the said land which was registered in the first defendant's name. The second defendant defaulted on the repayments; the plaintiff brought an action and obtained judgment in default of defence for the outstanding sum of RM101,001.80, and issued a notice of demand for the satisfaction of the judgment debt and of intention to commence legal proceedings in respect of the lien over the said land. The plaintiff contended that the second and third defendants had deposited with the plaintiff the title to the said land with the consent of the first defendant for the purpose of creating the lien holder's caveat, and also that the first defendant had transferred the said land to the second and third defendants.

Held:

[1] The plaintiff owed a duty to the court to clarify why the security provided in respect of the credit facility turned out to be in the nature of a lien and a lien-holder's caveat in respect of a property registered in the name of the first defendant, when according to the offer letter (which was duly accepted by the second defendant), the security was supposed to be by means of a first legal charge to be created by the second defendant. Furthermore, the supporting affidavits were inconsistent and confusing as they failed to clarify which document was the plaintiff's letter of offer and the correct date of the letter of offer. (pp 314 f & 315 g)

[2] In the circumstances, there had been no consent or authorisation by the first defendant to the second and third defendants to deposit the title, be it oral or written. It followed therefore that the lien was not a valid lien since the title was deposited, not by the registered proprietor (the first defendant) as required by s. 281 of the NLC, but by the second and third defendants. Hence, if the lien was not a valid lien, then the caveat was also not a valid caveat, and the court could not enforce the lien. (p 318 b-c)

[3] In the light of the slender evidence adduced by the plaintiff and the omission to furnish essential details, the court found that there had been no transfer of ownership, in any form whatsoever, in respect of the said land from the first defendant to the second and third defendants. Therefore, the claim by the plaintiff that the second and third defendants were the beneficial owners of the said land was baseless. (p 319 d-e)

[4] In light of the unexplained long delay in applying for the declaration by the plaintiff, which caused a substantial increase in the amount owing, thereby prejudicing the second and third defendants, this court was disinclined to grant the declaration. (p 320 e-h)

[Application dismissed.]

Case(s) referred to:

Perwira Habib Bank Malaysia Bhd v. Loo & Sons Realty Sdn Bhd & Anor (No 1) [1996] 4 CLJ 171 CA ***(refd)***

Jalaludeen Abdul Aziz v. Thrumalingam S Rajadurai & Anor [2001] 7 CLJ 578 HC ***(refd)***

Eshah Sa'at v. Meriam Sa'at [1975] 2 MLJ 97 ***(refd)***

Legislation referred to:

National Land Code, ss. 5, 241, 242, 257, 281, 322(3)(b), 330(5), forms 14A, 16A, 19D

For the plaintiff - Dhyana Shila; M/s Soo Thien Ming & Nashrah
For the 1st defendant - Suaran; M/s Skrine & Co
For the 2nd & 3rd defendants - SK Pari; M/s Rajadevan & Assocs

[The plaintiff has appealed to the Court of Appeal vide Civil Appeal No: B-02-196-2002.]

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

This is an application by the plaintiff for:

(a) a declaration that the second and third defendants are the owners of a piece of land, currently registered in the name the first defendant, Selangor Properties Sdn Bhd, known as Lot 3859, Pt 1712, HS (D) 14830, Mukim of Ulu Kelang (the "said land"); and

(b) an order that the said land be sold by public auction pursuant to ss. 281 and 257 of the National Land Code for the purpose of satisfying the judgment debt of the second defendant to the plaintiff.

The plaintiff bank had granted a credit facility of RM130,000 to the second defendant, Mohd Nor Rahmat, It is allegd by the plaintiff that, as security for the credit facility, a lien holer's caveat was created over the said land which, as has been said, is registered in the name of the first defendant,

The second defendant defaulted the repayments. The plaintiff brought an action against the second defendant in the High Court of Kuala Lumpur *vide* suit no. D2-23-1662-87 and obtained judgment in default of defence on 12 September 1987 for the outstanding sum of RM101,001.80.

A notice of demand against the second defendant in respect of the judgment debt was issued by the plaintiff to him in December 1987.

A notice of demand for the satisfaction of the judgment debt and of intention to commence legal proceeding in respect of the lien over the said land was issued by the plaintiff to the first defendant in May 1989.

The present originating summons was filed in 1996.

It is alleged by the plaintiff that the second and third defendants had on 4 January 1985 deposited with the plaintiff the title to the said land with the consent of the first defendant for the purpose of creating a lien-holder's caveat, in respect, of the said land.

A lien holder's caveat over the said land, lodged by the plaintiff, was registered on 11 January 1985.

It is further alleged by the plaintiff that the first defendant had in 1985 transferred the said land to the second and third defendants. However, the plaintiff, did not state as to when exactly the alleged transfer of ownership from the first defendant to the second and third defendants took place. Neither any sale and purchase agreement nor any transfer of ownership form (Form 14) was exhibited. What is exhibited is merely the title to the said land. But the, title shows that the registered owner is the first defendant In order to prove the transfer of ownership, the plaintiff merely relies on correspondenee between the first defendant and the plaintiff's solicitors. The two relevant letters from the first defendant to the plaintiff on the subject of transfer are dated 9 June 1989 and 28 August 1989. But the letters merely state that the said land was transferred to the second and third defendants in 1985 without giving further details such as the specific date and nature of the transfer. The letters also could not confirm whether the transfer was registered or not. When the plaintiff's solicitors queried the first defendant's solicitors regarding the alleged transfer, the latter replied that the file on the said land could not be traced and as such they could not supply any information as to transfer.

It is therefore not clear from the plaintiffs affidavit whether the alleged transfer of ownership of the said land took place before the deposit of the title (which is alleged to have taken place on 4 January 1985) with the plaintiff or after the deposit of the title.

I have dismissed the application with costs because of the following reasons.

First, upon examining the plaintiff's affidavits, the question arises: what was the actual security given by the second defendant in respect of the credit facility granted to him by the plaintiff? The facts as presented by the affidavits of the plaintiff do not seem to be consistent. If we were to refer to para. 3 and exh. UA1 of the plaintiffs affidavit at encl. 5 (letter of offer of the credit facility by the plaintiff to the second defendant dated 25 August 1984, which offer was duly accepted by the second defendant), it would appear, that the security was by means of a 'registered first legal charge for RM130,000 to be created by En Mohd Nor Rahmat over land held under Lot No: 162, Zooview, Ulu Kelang," A first legal charge is a charge effected by an instrument in Form 16A pursuant to ss. 241 and 242 of the National Land Code.

However, if we were to examine para. 3 and exh. TKH5 of the plaintiff's affidavit at encl. 2, it would appear that the security was by means of "an on-demand promissory note" for RM130,000 dated 25 August 1984.

Yet, if we were to base on para. 3 and exh, TKH4 of the plaintiff's affidavit at encl. 2, the security was by means of a lien and a lien-holder's caveat over a piece of land known as Lot 3859, Pt 1712, HS (D) 14830, Mukim of Ulu Kelang, registered in the name of the first defendant. A lien is created by the registered proprietor of a land pursuant to s. 281 of the National Land Code as security for a loan granted to him or to a another person. It is created by the registered proprietor depositing the title to the land with the lender. A lien is usually followed by a lien-holder's caveat. A lien holder's caveat is created by the person or body, with whom the title has been deposited as a security, by means of an instrument known as form 19D pursuant to s. 330 of the National Land Code.

In this regard, it is pertinent to note that whilst the first charge, as has been pointed out, was supposed to be in respect of a property known as "Lot No. 162, Zooview, Ulu Kelang", the lien was in respect of a property known as "Lot 3859, Pt 1712, HS (D) 14830, Mukin of Ulu Kelang". Do these two addresses (ie, Lot No 162 and Lot 3859) refer to the same piece of property? Now, it is significant to observe that there is nothing in the plaintiff's affidavits that positively stated that "Lot 3859, Pt 1712, HS (D) 14830, Mukim of Ulu Kelang" and "Lot No: 162, Zooview, Ulu Kelang refer to the same piece of land.

In my view, the plaintiff owes a duty to the court to clarify whether the addresses refer to the same land; and also to explain why the security provided in respect of the credit facility turned out to be in the nature of a lien and a lien-holder's caveat in respect of a property registered in the name of the first defendant, Selangor Properties, when according to the offer letter (which, as has been pointed out, was duly accepted by the second defendant) the security was supposed to be by means of a first legal charge to be created by the second defendant. There must be full and frank disclosure of all facts by the plaintiff before the court can consider whether or not to grant the declaration sought.

Second, according to para 3 of the plaintiff's affidavit at encl. 2, exh. TKH5 was an offer letter of overdraft facility dated 25 August 1994 issued by the plaintiff to the second defendant. The last sentence of para. 3 of the affidavit at encl. 2 states:

> Bersama-sama ini saya lampirkan sebagai eksibit "TKH4" sesalinan benar kaveat tersebut dan sebagai eksibit TKH5" sesalinan surat tawaran daripada Plaintif kepada defendant kedua bertarikh 25 Ogos 1994 untuk kemudahan Overdraf tersebut.

Yet, if we were to examine exh. TKH5 as referred to above it is clear that it neither an offer nor is it dated 25 August 1994. It appears to be, as written on it, an "on demand promissory note"; and it is dated 25 August 1984. For it read:

August 25th 1984

The Manager
Perwira Habib Bank Malaysia Bhd

Dear Sir

I We beg to enclose an on-demand Promissory Note for $ [illegible] **(Ringgit One hundred and thirty thousand)** signed by me/us which is given to you as security for the repayment of any overdraft which is a present outstanding in may/our name ... [the words in bold are handwritten]

Was this a case of double mistake – a mistake both as to the nature of the document and also as to the date of the document? If it was a mistake, then it was the duty of the plaintiff to file in a corrective affidavit. The plaintiff had every opportunity to do so; especially when subsequently in April- 2001, that is to say more than four years later, they took the step to file another affidavit, namely, "afidavit tambahan plaintif', at encl. 5, to supplement their affidavit at encl. 2. But the affidavit at encl. 5, instead of correcting the mistake (assuming that there was a mistake), went on to repeat what had been stated earlier at para. 3 of the affidavit at encl. 2. For para. 3 of the affidavit states "... dan saya mengulangi di sini perenggan 3 dalam afidavit plaintif yang diikrarkan oleh Tan Kwe Hee pada 28 November 1996 ...". It would appear that from the plaintiff's standpoint there had been no mistake in para. 3 of the earlier affidavit at encl. 2 (it is also to be observed that even the plaintiff's written submission did not concede that para. 3 of encl. 2 contained a factual error)! But if there had been no mistake, then, we have before us a murky or confusing situation. If there had been no mistake, then, which document is supposed to be the offer letter from the plaintiff? Was it exh. TKH5 of encl. 2, or was it exh. UA1 of encl. 5? And what is the correct date of the offer letter? Was it 25 August 1984 (as stated in para. 3 of encl. 2) or was it 25 August 1994 (as stated in para. 3 of encl. 5)? 1 am not minded to – indeed I do not think that I should – grant the application (especially the prayer for a declaration) when the supporting affidavits are inconsistent and confusing.

Third, the title was deposited not by the registered proprietor (who is the first defendant) as required by the law but was deposited by the second and third defendants. Section 281 of the National Land Code requires the issue document

to title to have been deposited with the plaintiff by the registered proprietor (see the definition of "proprietor" at s. 5 of the National Land Code).

It states:

> Creation, and effect, of, liens
>
> 0281.(1) Any proprietor or lessee for the time being my deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat;

Note the words "Any proprietor ... may deposit". The provision is very clear: only a proprietor may deposit the title. And in s. 5, "proprietor" is defined as:

> "proprietor" means any person or body for the time being registered as the proprietor of any alienated land.

Therefore, the title should have been deposited by the first defendant, being the registered proprietor, and not by anyone else. Not even by the borrower – even if he happens to be in possession of the title (see *Perwira Habib Bank Malaysia Bhd v. Loo & Sons Realty Sdn Bhd & Anor (No 1)* [1996] 4 CLJ 171).

It was asserted, by the plaintiff that the title was deposited by the second and third defendants with the consent of the first defendant. The first sentence para. 3 of the affidavit at encl. 2 states:

> 3. Pada 4hb Januari, 1985, Defendan Kedua dan Defendan ketiga tersebut dengan persetujuan defendan Pertama telah depositkan surat hakmilik asal Tanah tersebut dengan Plaintif dan satu Kaveat Pemegang Lien ("Kaveat tersebut") telah dimasukkan ke atas Tanah tersebut bagi faedah Perwira Affin Bank Berhad (dahulu dikenali sebagai Perwira Habib Bank Malaysia Berhad), iaitu Plaintif sebagai sekuriti untuk suatu kemudahan Overdraft yang diberikan kepada Defendan Kedua.

Remarkably, the alleged consent (dengan persetujuan defendan pertama) is not exhibited for the examination of the court. Now, is mere consent sufficient for the purpose of satisfying the requirement of s. 281? This is a nice legal question. But the applicant, however, has not provided me with any authority to show that a mere consent by the registered proprietor is sufficient for the purpose of s. 281. In the present case, although the issue of consent has been raised, nevertheless, I do not propose – and I do not think it necessary – to make a ruling whether or not "consent" is sufficient as a matter of law for

the purpose of s. 281. The plaintiff, if they were really serious about the effect of the alleged consent in the light of s. 281, should have exhibited the consent to enable the court to evaluate as to its true nature and effect. If such consent is expressed in a manner that the court is satisfied that there is a clear, unequivocal and unconditional authorisation by the registered proprietor for the title to be deposited by the second defendant with the plaintiff as security in respect of the particular loan or credit facility, then, perhaps, it would have been appropriate for me to make a ruling as to whether or not, as a matter of law, such clear, unequivocal and unconditional authorisation by the registered proprietor is as good as if the registered proprietor himself had deposited the title with the person or institution granting the loan, thus satisfying the requirement of s. 281. However, be that as it may, even if I were to proceed on the hypothesis that, as a matter of law, a clear, unequivocal and unconditional authorisation by the registered proprietor for the deposit of the title to be effected by the second and third defendants (as opposed to actual deposit by the registered proprietor themselves) is sufficient for the purpose of s. 281, still, in the present case, I cannot accept that there has been authorisation by the registered proprietor, namely, the first defendant. The second and third defendants, in their affidavit, have denied that there was consent by the first defendant. In the light of this clear denial, the plaintiff must provide satisfactory evidence as to the giving of the consent or authorisation (and not mere unsubstantiated assertion that there was consent). The legal burden is on the plaintiff. But the plaintiff failed to furnish any evidence of consent. Apart form the first and second defendants themselves, only the plaintiff would know whether or not there was consent, and if there had been consent, whether or not the consent was a mere oral consent or whether it was a written consent. It will be observed that, in the first place, the plaintiff in their affidavit failed to specify whether the consent supposedly given by the first defendant was a written consent or was a mere oral consent. If it was a mere oral consent, the plaintiff must explain how, when and where it was given and why the plaintiff bank had not insisted on a written consent since, strictly and properly, that should have been the case?

To my mind, subject to what I have said earlier about the consent being in the nature of a clear, unequivocal and unconditional authorisation, if, indeed; there had been consent by the first defendant then, in all likelihood, it would have been a written consent and net an oral consent because it is unthinkable that the plaintiff being a bank, a financial institution, would be so irresponsible or imprudent to agree to the consent being; given orally. It would be wrong procedurally for the bank to have accepted a consent given in such a manner. Financial institutions are generally known to be very strict and careful when processing securities. But supposing for a moment, for the sake of argument,

that there had been a written consent, which normally should, and in all probability would, have been the case, then the consent would have been in the possession of the plaintiff's bank. And assuming further that the written consent was in the possession of the plaintiff, the plaintiff must exhibit the consent. And if the plaintiff failed to exhibit the consent, then they owe the court an explanation as to why they could not exhibit the consent. But in the present case, the plaintiff, having failed to exhibit the consent, have not offered any explanation. In the circumstances, it is my finding that there had been no consent or authorisation by the first defendant, be it oral or written.

In my opinion, it follows therefore that the lien is not a valid lien since the title was deposited, not by the registered proprietor himself as required by s. 281, but by some other person. If the lien is not a valid lien, then the caveat is also not a valid caveat. And if the lien and caveat are not valid, the court cannot enforce the lien.

The plaintiff's counsel further submitted that there is no necessity any furnish any evidence of consent by the first defendant because the counsel, had orally informed the court at the hearing that the first defendant was not contesting the plaintiff's application (it must be pointed out that the first defendant did not file in any affidavit or make any submission): In my judgment, merely because the first defendant did not contest the application, it does not mean that in respect of the second and third defendants the plaintiff is absolved from the duty to furnish evidence of the alleged consent, or that the court must assume that there had been a proper authorisation by the first defendant as regard the deposit of the title.

It is, however, alternatively, argued by the plaintiff, in their written submission, that the second and third defendants are the "beneficial owners" of the land and as such they themselves could deposit the title with the plaintiff for the purpose of s. 281 without the need of a consent by the first defendant. As regards the definition of "proprietor" in s. 5 which defines "proprietor" as being registered proprietor, it is further submitted by the plaintiff that s. 281 of the National Land Code is exceptional and is therefore governs by the phrase "unless the context otherwise requires" which appears in the opening part of s. 5. In other words, it was submitted by the plaintiff that the definition of "proprietor" in s. 5 does not apply to s. 281. It was contended by the plaintiff that the word "proprietor" in s. 281 should be given an interpretation wider than that as provided by s. 5 so as to include a beneficial owner in order to prevent injustice and hardship to all parties in a conveyancing transaction.

In the first place, what does the plaintiff mean by "beneficial owners". There is nothing in the plaintiff's affidavits explaining how the second and third defendants became the so-called beneficial owners of the said land. The plaintiff

in para. 2(b) of their affidavit at encl. 2, on the contrary, states that the first defendant had transferred the land to the second and third defendants ("... defendant pertama telah memindah milik ..."). What do they mean by "memindah milik"? The words "memindah milik" can and, indeed, normally mean that there had been a charge in the registered ownership and imply that the second and third defendants are now the registered owners and not mere "beneficial owners" of the land. But such an implied assertion is contradicted by the plaintiff's own affidavit. The title to the land, exhibited as TKH1 of encl. 2, clearly shows that the registered owners is the first defendant, Selangor Properties Sdn Bhd. The plaintiff might say (but significantly, they didn't) that "memindah milik" here means mere execution of the transfer form – Form 14A of the National Land Code – by the parties to the transaction. But assuming that that is the case, they, why didn't they say so in no uncertain terms in their affidavits. And why is the Form 14A not exhibited? And when was Form 14A executed; what is the consideration for the transfer and how much of the purchase price had been paid (if any is paid) by the second and third defendants to the first defendant? In the light of the slender evidence adduced by the plaintiff and the omission to furnish the court with essential details, the court therefore makes a finding that there has been no transfer of ownership in what ever form in respect of the said land from the first defendant to the second and third defendants. In other words, the claim by the plaintiff that the second and third defendants are the beneficial owners of the said land is baseless. In this regard, it must also be pointed out that the failure on the part of the plaintiff to inform the court as to the date of the alleged transfer is, an, important consideration adverse to the plaintiff. For, assuming that the alleged transfer was either in the form of actual registration of transfer of ownership or in the form of mere execution of Form 14A, and assuming further that such a transaction took place after the registration of the lien holder's caveat on 11 January 1985 by the plaintiff, then, any attempt to register that instrument of dealing by the defendants, would be in contravention of s. 330(5) read with s. 322(3)(b) of the National Land Code. The Form 14A, once it has been duly executed by the parties, is an instrument of dealing – see *Jalaludeen a/l Abdul Aziz v. Thrumalingam a/l S Rajadurai & Anor* [2001] 7 CLJ 578. Section 322(3)(b) prohibits the registration of the instrument of dealing by the defendants once a private caveat or a lien holder's caveat has been registered by the plaintiff in respect of the land.

I cannot accept the argument by the plaintiff that the definition of "proprietor" in s. 5 of the National Land Code does not apply to s. 281, and that the word "proprietor" in s. 281 should be given a wide interpretation so as to include a beneficial owner. With respect, I am not impressed by such an argument. I

fail to see anything peculiar or exceptional in s. 281 of the National Land Code such that the definition of "proprietor" in s. 5 should not be applicable to that section.

Fourth, the plaintiff's main affidavit ie, encl. 2 contains a serious defect. It is deposed by one Tan Kwe Hee on behalf of the plaintiff bank. But the affidavit does not state whether the deponent was an officer of the plaintiff bank. In my opinion, it is important for the deponent to state his position with the plaintiff bank (for example, whether he is the relevant branch manager or credit officer of the bank). In the absence of such an averment, I will infer that the deponent Tan Kwee Hee is not an officer of the plaintiff bank. However, I do note that he did state in his affidavit at encl. 2 that he was an attorney of the plaintiff. But the problem here is that the deponent Tan Kwee Hee did not exhibit the power of attorney. If he does not propose to exhibit the power of attorney, then, at the very least, he should have provided some detail of the instrument conferring on him the power of attorney (for example, when was the power of attorney issued and by whom, what is the registration number of the power of attorney what is the date of registration and at which High Court was the regisration effected). In the light of this dearth of information, even if I were to accept the affidavit, I cannot give much weight to it's content.

Finally, there has been an unexplained long delay in applying for the declaration. At the time of the default judgment in 1987, the amount owing was merely RM101,001.80. The plaintiff could have filed the application to enforce the lien then. But for reasons best known to the plaintiff, they chose not to. The present originating summons was only filed in 1996, meaning it was only filed nine years later. By that time (1996), by reason of the accumulation of interest, the amount owing had swelled up to more than four times the original amount reaching the figure of RM485,191.39. The plaintiff has failed to explain this long and unreasonable delay. This, in a way, is prejudicial to the second and third defendants. This failure on the part of the plaintiff to explain for the inordinate delay is to my mind an important consideration in deciding whether or not the declaration sought should be granted. I have the discretion whether or not to grant the declaration prayed for but I am duty bound to exercise the discretion judiciously. In the light of this unexplained long delay, which has, caused a substantial increase in the amount owing, thereby prejudicing the second and third defendants, I am not inclined to grant the declaration (see *Eshah binti Sa'at v. Meriam binti Sa'at* [1975] 2 MLJ 97).